

# COURT OF APPEAL OF YUKON

Citation: *R. v. Larue*,  
2018 YKCA 9

Date: 20180613  
Docket: 13-YU727

Between:

**Regina**

Respondent

And

**Norman Eli Larue**

Appellant

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Before: The Honourable Madam Justice Bennett  
The Honourable Madam Justice Dickson  
The Honourable Madam Justice Charbonneau

On appeal from: An order of the Supreme Court of Yukon, dated July 3, 2013 (*R. v. Larue*, Whitehorse Registry File No. 10-01510).

Counsel for the Appellant: Vincent Larochelle

Counsel for the Respondent: Noel Sinclair  
Lauren Whyte

Place and Date of Hearing: Whitehorse, Yukon  
November 23, 2017

Place and Date of Judgment: Vancouver, British Columbia  
June 13, 2018

**Dissenting Reasons by:**

The Honourable Madam Justice Bennett

**Written Reasons in by:**

The Honourable Madam Justice Dickson (page 26, para. 81)

**Concurred in by:**

The Honourable Madam Justice Charbonneau

**Summary:**

*The appellant seeks to overturn a conviction for first degree murder entered after a trial in which the jury heard a range of Mr. Big evidence and hearsay evidence. The appellant says that the trial judge erred in: admitting the hearsay statements of Ms. Asp; allowing the jury to hear testimony about the credibility of evidence obtained through Mr. Big operations; his jury charge, especially in relation to Vetrovec and Mr. Big instructions; dismissing his application for a mistrial; and, dismissing his no-evidence motion for first degree murder. Held: Appeal dismissed. The judge did not err in admitting Ms. Asp's hearsay statements, given the procedural and substantive reliability factors that established their threshold reliability. These included the lack of motive for Ms. Asp to be untruthful, corroborative evidence including DNA evidence, the appellant's statements to undercover operators and striking similarities between Ms. Asp's statements and the appellant's statements, together with the record of Ms. Asp's own trial proceedings. Madam Justice Bennett dissenting, would order a new trial on the basis that the trial judge erred in admitting the out-of-court statements of Ms. Asp without sufficient indicia of the procedural or substantive reliability of those statements.*

**Dissenting Reasons for Judgment of the Honourable Madam Justice Bennett:****Introduction**

[1] On July 3, 2013, a jury found Norman Eli Larue guilty of the first degree murder of Gordon Seybold, who was killed on March 26, 2008 in Yukon Territory. Mr. Larue appeals against his conviction. He says the trial judge erred in admitting out-of-court statements by Ms. Christina Asp, originally a co-accused, who was tried separately and convicted of second degree murder. She refused to testify at Mr. Larue's trial, and her prior statements in the form of recordings taken during a "Mr. Big" operation targeting her and Mr. Larue were admitted into evidence for the truth of their contents under the principled approach to hearsay. Mr. Larue also submits that the trial judge erred in allowing the jury to hear testimony about the credibility of evidence obtained through Mr. Big operations, in violation of the rule against oath-helping; delivered deficient jury instructions relating to the Mr. Big operation and to a Vetrovec witness; and that he erred in dismissing applications seeking a mistrial and a no-evidence declaration on the charged offence of first degree murder.

[2] In my view, the trial judge erred in admitting Ms. Asp's hearsay statements. I would allow the appeal and order a new trial on the charge of first degree murder.

### **Background**

#### **Initial investigation**

[3] On March 26, 2008, the Royal Canadian Mounted Police ("RCMP") attended the scene of a fire at a marihuana grow operation, after firefighters found human remains at the scene. The firefighters found the body on or near a mattress as they were removing the roof of a burnt cabin from the embers of the fire. By examining an intact right-side jawbone found at the scene, a dentist, Dr. Severs, identified the remains as belonging to Mr. Seybold, who ran the grow-op on the property, and on an adjoining property.

[4] That same day, the police found an aluminum baseball bat and rifles in a garbage can at a rest area. Witnesses at trial later established that the rifles came from Mr. Seybold's residence, and blood stains on the bat and the rifles contained DNA matching that of Mr. Seybold. A DNA profile on the bat also matched Mr. Larue. The police officer who seized the rifle and bat acknowledged that, contrary to cross-contamination protocols, she seized a variety of items from the garbage can, including the rifle and bat, using the same pair of gloves.

[5] At the scene of the grow-op, investigators collected paint chips off a tree trunk matching the type of paint used on the model of vehicle owned by Jessie Asp (Christina Asp's mother), a Green GMC Jimmy truck ("GMC"). In the course of the investigation, the RCMP purchased the GMC. Analysis of the GMC uncovered a hair containing unidentified female DNA, a bloodstain containing DNA belonging to Mr. Seybold, a knife with bloodstains that matched Mr. Larue's DNA, and another bloodstain containing male DNA that did not match Mr. Larue.

[6] Witnesses testified that the GMC had a large dent in its bumper, and that Jessie Asp's daughter Christina and Mr. Larue had access to the vehicle that day.

Ms. Asp and Mr. Larue were in a romantic relationship during the entire police investigation.

[7] The police searched Jessie Asp's home with her consent. They found a notebook belonging to Ms. Asp, and two bloodstained towels. The notebook contained a map to Mr. Seybold's residence in Ms. Asp's handwriting, and one of the towels contained bloodstains matching DNA from Ms. Asp and Mr. Seybold.

[8] At some point in early April 2008, Mr. Larue and Ms. Asp left Whitehorse to visit Mr. Larue's sister in High River, Alberta. On April 22, 2008, the pair were arrested in Edmonton and re-incarcerated for violating parole terms flowing from prior offences.

### **Mr. Big Operation**

[9] The Mr. Big operation began on February 8, 2009 when Ms. Asp was released from custody for the parole violation. Two female undercover officers approached her with an offer of employment in a criminal organization. At the time, she was unemployed and living in a halfway house. Over the course of seven months, she participated in scenarios involving surveillance, threatening people, and smuggling weapons across the border. She was given gifts of nominal value, the organization paid her rent, and she was flown to Halifax on a recreational trip.

[10] Over the seven months, Ms. Asp gave statements to the undercover officers at least five times regarding the killing of Mr. Seybold.

[11] On February 27, 2009, Ms. Asp told undercover operators "me and Norman [Larue] got into something somewhat deep...I seen pretty much Norman do something...pretty much that person is not alive". Later that day, Ms. Asp described the killing to another undercover operator, saying that Mr. Larue beat Mr. Seybold with an aluminum bat and burned the cabin down.

[12] The next day, February 28, 2009, Ms. Asp met "Mr. Big" in Red Deer. In this case, the "Mr. Big" figure was a female officer. I will use the term "Mr. Big" in these

reasons, as that is how the concept is discussed in the jurisprudence. Ms. Asp told Mr. Big that Mr. Larue was fighting with Mr. Seybold and was getting the worst of it. She grabbed an aluminum bat that Mr. Seybold had wielded, and beat Mr. Seybold with it. She said Mr. Larue took the bat, and beat Mr. Seybold some more and then burned the cabin down.

[13] On March 3, 2009, Ms. Asp re-enacted events around the killing with two undercover officers. She described how she and Mr. Larue beat Mr. Seybold with a bat and then Mr. Larue lit the cabin on fire. She could not find Mr. Seybold's property when she attempted to bring undercover officers there during the re-enactment, but she did take them to the rest stop where the police had recovered rifles and the bat linked to the property.

[14] The Crown successfully sought to tender the February 28 and the March 3 statements for the truth of their contents before the jury.

[15] On July 13, 2009, Ms. Asp participated in another re-enactment, where she said, "someone ended up dying", that there was a baseball bat involved, and that the victim "...ended up dying and we end up burning him, burning his whole house with him inside it".

[16] During the first part of the Mr. Big operation, Mr. Larue was in jail for a prior offence. Ms. Asp corresponded with him, and told him during a visit that she now worked for a powerful criminal organization. She told Mr. Larue that she had implicated him to the criminal organization in Mr. Seybold's killing.

[17] On July 29, 2009, after his release from prison on the prior sentence, an undercover officer interviewed Mr. Larue for a job as "muscle" for the criminal organization. During the interview, Mr. Larue told the undercover officer that he and Ms. Asp went over to Mr. Seybold's house at the spur of the moment after being prompted to "deal with him" by Jessie Asp, apparently as recourse for Mr. Seybold "disrespecting" her. Mr. Larue told the undercover officer that he and Ms. Asp hit

Mr. Seybold over the head with a baseball bat, and then lit his house on fire and left the guns and bat at a rest stop.

[18] Later that day and the next day, Mr. Larue was interviewed by another officer, who was undercover as a hitman. In that interview, Mr. Larue gave a contradictory story, saying that they went to rob the grow-op for “quick cash”, and beat up Mr. Seybold and slit his throat with a knife when he discovered they had broken into his home. In this interview, he also said that Mr. Seybold was disrespecting Jessie Asp, and he said that he “tried to have it planned out in my head”, and he knew there was going to be “one of three ways” he was going to do it, but that he “couldn’t get my hand on a gun so I knew it was one of the two...”.

[19] Between July 29 and August 4, 2009, the police intercepted phone calls between Mr. Larue and Ms. Asp after Mr. Larue’s Mr. Big interviews. The following was recorded: Mr. Larue asks Ms. Asp to tell “her people” in the organization that if he has a place to train, he will do it; after Ms. Asp met an undercover officer, Mr. Larue said “she did good” and that he was proud of her; and, Mr. Larue told Ms. Asp he was anxious to get to work.

[20] On August 4, 2009, police arrested Mr. Larue and Ms. Asp, and the Mr. Big investigation concluded.

### **Ms. Asp’s Trial**

[21] The Crown initially elected to prosecute Ms. Asp and Mr. Larue jointly, but later decided to sever their indictments and undertake two separate trials because Mr. Larue’s lawyer became very ill. Ms. Asp’s trial occurred before Mr. Larue’s, and ended with a second degree murder conviction on June 22, 2012.

### **Mr. Larue’s Testimony at Trial**

[22] Mr. Larue testified at his trial. He denied ever being at Mr. Seybold’s residence or being involved in his death. He said that he was shocked and mad that Ms. Asp implicated him in the killing, but that he was scared of the criminal organization, and he thought they would kill him and Ms. Asp. He said that he lied to

the undercover officers about being involved in the killing to protect himself and Ms. Asp. He said that, when speaking to undercover operators, he testified that he insisted on keeping Ms. Asp out of his conversations.

[23] He testified that Jessie Asp, who was herself involved in the drug trade, had stated on many occasions that she wanted to beat up Mr. Seybold and set his house on fire.

[24] He testified that the dent on the bumper of the GMC was caused when they got stuck in the snow while driving (rather than from hitting the tree on Mr. Seybold's property), and that he later intentionally backed the GMC into a lamppost because Jessie Asp would have been mad to learn the dent was caused when they got stuck in the snow.

### **Expert Evidence**

[25] Dr. Charles Lee testified as an expert forensic pathologist. He examined Mr. Seybold's remains, and was unable to identify his cause of death, or to determine whether he was alive at the time of the fire. Dr. Lee observed "severe" atherosclerosis in Mr. Seybold, and agreed that he could have died of a heart attack. Dr. Lee also examined Mr. Seybold's skull and other bones and found no signs of pre-mortem blunt or sharp force injuries, which may have been because many internal organs were completely absent or severely charred. The body parts Dr. Lee observed were severely burnt, and less than 10% of Mr. Seybold's body was available for him to examine.

[26] Derek Sutherland testified as an expert in forensic biology and DNA evidence. He testified that DNA drawn from mixed biological material on the baseball bat yielded a profile that had a probability of one in 7.5 trillion of coming from someone other than Mr. Seybold.

[27] Mr. Sutherland also testified that under guidelines in place in 2008, another individual's DNA extracted from the mixed biological material on the bat yielded a one in 3,500 chance of coming from someone other than Mr. Larue. Under new

guidelines regarding the analysis of mixed biological samples introduced in 2009, Mr. Sutherland re-analyzed the sample and came to the conclusion that it had a one in 9.3 million chance of deriving from someone in the Canadian Caucasian population other than Mr. Larue.

### **Undercover Officer Evidence**

[28] Four undercover officers testified. The jury heard testimony that Mr. Big operations are designed to elicit truthful statements, and that the fictitious criminal organization here adopted values of trust, honesty and loyalty which Ms. Asp accepted and adhered to. One undercover officer asserted that honesty and truthfulness “are inherent to the whole Mr. Big sting”.

### **Hearsay Ruling**

[29] The Crown subpoenaed Ms. Asp to testify at Mr. Larue’s trial. When she was called to the stand, she refused to be sworn or affirmed. She told the trial judge that she refused to testify, and declined to explain the reason for her refusal. The trial judge cited her for contempt of court and she was dismissed.

[30] Accordingly, the Crown applied to admit two recordings of Ms. Asp under the principled approach to the hearsay rule created during the Mr. Big Operation. The first is a video-recorded statement made to an undercover officer on February 28, 2009 that Ms. Asp gave to an undercover operator in a penthouse apartment in Edmonton. In that statement, Ms. Asp said that Jessie Asp told her and Mr. Larue that she was in a drug-related dispute with Mr. Seybold, and that she wanted him “out of the problem”. Ms. Asp agreed with an undercover officer’s suggestion that “the plan was just to eliminate him”. Ms. Asp said that she took Mr. Larue to Mr. Seybold’s cabin, and the two men began fighting. Ms. Asp stepped in because Mr. Seybold “almost got the best” of Mr. Larue, and she hit Mr. Seybold a few times on the head with a baseball bat and heard his head “crack”. Ms. Asp said she assumed Mr. Seybold was dead, and then Mr. Larue burned the cabin down. Later in the statement, Mr. Asp clarified that she hit Mr. Seybold three times on the head as the two men were fighting. She added that she then passed the bat to Mr. Larue,

who “started swinging” and “did him pretty much in”. She said there was a lot of blood, and that Mr. Seybold’s skull and some other bones were probably broken.

[31] The second is an audio-recorded statement made during a re-enactment of the crime on March 3, 2009. Ms. Asp said that, as Mr. Larue and Mr. Seybold were fighting, Mr. Larue stumbled over a stool. At that point, Ms. Asp grabbed the bat – which was already in Mr. Seybold’s house – and hit Mr. Seybold in the head three times and swung it hard enough that she heard his skull crack. Ms. Asp then passed the bat to Mr. Larue, who “went to town with [Mr. Seybold] as he was lying on the ground limp. She said Mr. Larue then tied Mr. Seybold to a pole in the cabin, and then lit it on fire. Ms. Asp said that they “weren’t really supposed to ki... like I don’t know, just threaten him, give him a scare...”.

[32] At the *voir dire* hearing, the defence conceded that both statements met the requirement of necessity since Ms. Asp refused to testify, but argued that neither met the standard of threshold reliability, and thus should not be admitted. The defence stressed that Ms. Asp was a self-professed liar, and that the circumstances in which the undercover officers elicited her statements did not lend to their threshold reliability. The defence argued that the undercover officers were intent on manipulating her, and that Ms. Asp was motivated by money and manipulated and lied to them in return.

[33] The trial judge relied on *R. v. Bradshaw*, 2012 BCSC 2025 to guide his analysis on whether to admit, as hearsay evidence, recordings derived from a Mr. Big operation. *Bradshaw* was overturned by the Court of Appeal for British Columbia (2015 BCCA 195), whose decision was affirmed by the Supreme Court of Canada (2017 SCC 35).

[34] The trial judge held that the circumstances of the Mr. Big operation lent “some measure of confidence to their having been made truthfully”, as the undercover officers made it clear that honestly, truth, loyalty, and trustworthiness between members were fundamental principles of the criminal organization, to which Ms. Asp said she adhered.

[35] Since both statements were recorded, the trial judge said one could assess the tone and demeanour of both Ms. Asp and the undercover officers as a means of assessing the “accuracy or reliability of the truth of those statements”. He also held that Ms. Asp had no motive to lie about Mr. Larue’s involvement in the murders, as the two were in a romantic relationship with no evidence of animosity. The trial judge further found that other evidence corroborated the information in the hearsay statements. For example: in the statements she refers to having a flashlight that night, and there was a flashlight found in their possession with Mr. Seybold’s DNA on it; she says they used the GMC during the killing, and there was evidence of Mr. Seybold’s DNA on a floor mat in the car; she talked about alarm sensors on Mr. Seybold’s property the night of the killing, and there was other evidence that he had such sensors installed; she mentions an aluminum bat, and there was such a bat in evidence. The trial judge reasoned as follows:

[20] First, the statement to Ms. Big was both video and audio recorded. Thus one is able to assess the tone and demeanour of Ms. Asp as she makes her statement, as well as assess the manner of operation of the police undercover operator, K.B. Similarly, the statement of her re-enactment was audio recorded, thus permitting one to assess the statement made, how it came about, the mood, the tone, and the conversation by the undercover operators.

[21] Second, as already mentioned under point eight, the values of truth, honesty, and loyalty amongst the organization suggests that it is likely that Ms. Asp was being truthful in her statements to her colleagues. Further, both statements contained admissions by Ms. Asp that she struck Mr. Seybold with the bat. These were admissions against her interest as they inculpated her directly in the murder, and thus, I suggest those statements are more likely than not to be true.

[22] Third, the circumstances surrounding the initial disclosure by Ms. Asp to Constable V.S. in the car in the Dairy Queen parking lot, suggested the statements later given are essentially the same in terms of Mr. Larue and Ms. Asp’s involvement in the killing. Ms. Asp did not have to bring the matter up. She had already said that she had killed her ex-boyfriend. The organization, therefore, already knew she had killed somebody. There was no real benefit to her bringing up any involvement in Mr. Seybold’s death. Moreover, given that she had initially downplayed her role in Mr. Seybold’s death, there can be no merit to the suggestion that she was trying to build herself up in V.S.’s eyes. In fact, it might be regarded as the opposite. In any event, Ms. Asp quickly owned up to having struck several blows herself using the bat. Her basic story was thereafter relatively consistent with K.B. and the re-enactment. Furthermore, there was no motive for Ms. Asp to lie about Mr. Larue’s involvement in the murder. She was clearly involved in a romantic

relationship with him. There is no evidence of animosity towards him. To the contrary, she had his back and he had hers. It defies common sense to think Ms. Asp would make up a story about Mr. Larue and her killing Mr. Seybold.

[23] Fourth, there is evidence to support or corroborate much of what Ms. Asp has said in her statements. For example, she refers to their having a flashlight with them that night, and there is in evidence a flashlight found in their possession with Mr. Seybold's DNA on it. Ms. Asp says they drove out to Mr. Seybold's residence in Jessie Asp's Jimmy and left in it after the killing. There was some evidence of Mr. Seybold's DNA having been found on a floor mat in the Jimmy after Mr. Seybold's death. Ms. Asp talked about alarm sensors on Mr. Seybold's property the night of the killing. There was evidence that there were, in fact, sensors installed on Mr. Seybold's property. Ms. Asp describes both her and Mr. Larue hitting Mr. Seybold with an aluminum bat. An aluminum bat was found with Mr. Seybold's DNA on it. She describes that after the killing, Mr. Larue backed the Jimmy into a tree; knocking it down and putting a dent in the rear bumper. There was evidence that a tree was found knocked down across the road at Mr. Seybold's property, as well as plant-like material being found in the trailer hitch area of the Jimmy. There were also some paint chips found at the scene, and evidence suggesting they matched the paint on the Jimmy. Ms. Asp told K.B. that they had to come up with a story to explain the dent in the bumper so she told Mr. Larue to back into a light standard at the hockey arena. There was evidence from O'Connor that he saw the Jimmy back into a light standard at the hockey arena. Ms. Asp said that Mr. Larue took two rifles from Mr. Seybold's residence, and that she put them in to a garbage container or a dumpster at a rest stop. Two rifles with Mr. Seybold's DNA were found in a dumpster following the killing. Ms. Asp identified the rest stop during their re-enactment where she put the rifles, and interestingly, she corrected D.L. when he mistakenly said that the rifles were taken into the Seybold residence. Ms. Asp made it clear that that was not the case, they were taken from the Seybold residence. She also said in her statement to D.L. that Mr. Larue smashed the rifles before she put them in the dumpster. The rifles found were broken or damaged.

[24] The above examples are not meant to be a complete list of all the supportive or corroborative evidence, merely examples of it. While clearly there are some inconsistencies and differences in the various versions which Ms. Asp has given of the attack; for example, sitting on Mr. Seybold's lap; or initially denying that she had struck Mr. Seybold with the bat; or Mr. Larue tying Mr. Seybold up with a rope after he was beaten; or Ms. Asp not being able to find the Seybold residence on the re-enactment drive, I do not find such discrepancies, admissions, or additions affect my decision on threshold reliability. They can easily be attributed to honest mistake, memory refreshed by the re-enactment, the fact that it was dark when they drove out to the property on the night of the crime, or the simple passage of time. No doubt, however, these are fruitful areas of argument for defence counsel to address with the jury as the ultimate finder of the facts. In the meantime, they do not cause me, in the face of the evidence as a whole, to conclude that the threshold reliability test has not been met. It is worth noting that in *Goodstoney, supra*, it was not simply a matter of inconsistencies in her statement, rather, the witness had actually specially recanted the statement which the Crown sought to introduce into evidence.

[36] The trial judge admitted both statements into evidence. As a result of that ruling, at the request of defence counsel (who is not counsel on this appeal), the entirety of Ms. Asp's out-of-court statements, including her trial evidence, was admitted in Mr. Larue's trial.

### **Mistrial Ruling**

[37] On the morning of June 18, 2013, the Crown played an audio recording to the jury of a conversation between Mr. Larue and an undercover officer posing as a hitman. The jury was provided a transcript of the recording. The transcript, but not the audio, erroneously included an excerpt which was intentionally not before the jury because it was determined to be inadmissible bad character evidence in an earlier *voir dire* ruling. The inadmissible evidence related to Mr. Larue's previous gang affiliations.

[38] The defence applied for a mistrial, arguing that the jury would be improperly influenced by the transcript, notwithstanding the fact that the audio itself – which was not tainted by the bad character evidence – was the actual evidence. The transcripts were removed from the jury as soon as the mistake was discovered. The trial judge held that the erroneously-included section of the transcript did not impair Mr. Larue's fair trial rights. He dismissed the application, provided the jury with corrected copies of the transcript, and gave a midtrial instruction clarifying that the jury had received the wrong transcript and that, in any event, transcripts themselves are not evidence. The trial judge also included in his final charge to the jury a direction that, for all aspects of the case, transcripts are not evidence.

### **No-evidence Ruling**

[39] At the close of the Crown's case, the defence brought a no-evidence motion on the first degree murder charge, arguing that there was no evidence of planning and deliberation.

[40] The trial judge dismissed the motion, holding that a reasonable jury, properly instructed, could use the evidence of Mr. Larue and Ms. Asp's discussions with undercover officers to find that planning and deliberation were made out.

**Vetrovec Warning**

[41] The trial judge cautioned the jury on their reliance on Ms. Asp's hearsay statements without corroboration. He reviewed her list of convictions and noted evidence "that she has an unsavoury reputation for violence, drinking and drug use". He said that her testimony "must be approached with care and caution because she may be inclined to be less than truthful and her memory may be distorted by the consumption of alcohol and drugs". He said that the jury should know that, because statements Ms. Asp made before her trial contradicted her testimony at her trial, "she is a liar" whose "evidence must be approached with the greatest care and caution". He then reviewed evidence which he suggested the jury might find confirmatory of her hearsay evidence adduced at Mr. Larue's trial, including:

- a) She consistently said Mr. Seybold was beaten with a bat;
- b) The police found a bat with blood on it linked to Mr. Seybold's DNA;
- c) Ms. Asp stated a number of times that they backed the GMC into a tree on Mr. Seybold's property, and that firefighters found a tree knocked over across Mr. Seybold's driveway; and
- d) There was forensic evidence that paint scraped off the tree matched the GMC's paint.

[42] The trial judge emphasized that these were "simply some examples" and that the jury would have to assess the whole of the evidence when considering Ms. Asp's hearsay testimony.

**Jury instructions on the Treatment of Mr. Big Evidence**

[43] Mr. Larue's trial was conducted prior to the release of the Supreme Court of Canada's companion decisions in *R. v. Hart*, 2014 SCC 52 and *R. v. Mack*, 2014

SCC 58 concerning the treatment of evidence obtained through Mr. Big operations. Mr. Larue does not take issue with the admissibility of his statements during the undercover operation. He does raise the issue of the correctness of the jury instructions.

[44] The trial judge told the jury that Mr. Big operations can generate false confessions by the target, who could be trying to impress the criminal organization. He said that it was up to the jury to consider the whole of the evidence as to whether Mr. Larue was being truthful to the undercover officers. He did not apply his discussion of the Mr. Big operation to Ms. Asp's hearsay evidence, which was obtained through the same Mr. Big operation. The heart of the jury charge on Mr. Big evidence is as follows:

I want to talk for a moment about the Mr. Big operations.

Both Christina Asp and Mr. LaRue described their involvement in the killing of Mr. Seybold to undercover police officers who were posing as members of a criminal organization and offering both Ms. Asp and Mr. LaRue employment in that criminal organization. Christina Asp was not only paid money for her time, it appears that she also received benefits which were, not strictly, speaking wages or payment for her time, for example, an inexpensive bracelet, a winter coat and a recreational trip to Halifax.

Mr. LaRue, it appeared from his evidence on the stand, was not initially interested in working or being involved in this criminal organization and only sought to get into it in order to get Christina Asp out of it. You may wish to compare that evidence with the wiretap conversation where Mr. LaRue talks about his being employed with the criminal organization. You should remember that the undercover operators were lying to Mr. LaRue in their attempts to recruit him into their organization and find out from him what involvement, if any, he had in Mr. Seybold's death.

Mr. LaRue testified he was telling the undercover operator lies about his being involved in the Seybold killing. He said his interviews with Constable J.P. and Corporal D.L. were akin to a job interview. He wanted the job, so he told them what he thought they wanted to hear in order to persuade them, especially Constable J.P., that he was the right guy for the job.

You'll recall the evidence of Corporal D.L., who said that the Mr. Big operations can result in false confessions. Your common sense will also tell you that there is a risk of someone making a false confession in a Mr. Big type scenario in order to impress or to enhance his prospects of getting employed. It is for you to consider on the whole of the evidence whether or not Mr. LaRue was being truthful in his statements to Constable J.P. and Corporal D.L. in the Mr. Big operation.

[45] The trial judge then instructed the jury with respect to their other duties. Elsewhere in the charge, the trial judge also provided a detailed description of the Mr. Big investigation, including an account of undercover officers' interactions with Ms. Asp, and that Mr. Larue claimed in his testimony that he feared the organization.

### **Grounds of Appeal**

[46] Mr. Larue submits that the trial judge erred in:

- a) Admitting Ms. Asp's hearsay evidence under the principled approach to hearsay;
- b) Allowing the jury to hear testimony about the credibility of evidence obtained through Mr. Big operations, in violation of the rule against oath-helping;
- c) His jury charge, especially in relation to the *Vetrovec* and Mr. Big instructions;
- d) Dismissing the application for a mistrial; and
- e) Dismissing the no-evidence application for first degree murder.

### **Admissibility of Ms. Asp's Hearsay Statements**

[47] In *Bradshaw*, the Supreme Court altered the legal landscape with respect to the admissibility of out-of-court statements for the truth of the contents. The hearsay ruling in this case was decided prior to both the Court of Appeal and the Supreme Court decisions in *Bradshaw*, but it must be examined in light of those decisions. Because Mr. Larue is still "in the judicial system", he is entitled to rely on post-trial developments of the law: *R. v. Dario*, 2018 BCCA 85 at para. 34, citing *R. v. Wigman*, [1987] 1 S.C.R. 246 at 257-58.

[48] In *Bradshaw*, Justice Karakatsanis, writing for the majority, carefully reviewed the legal principles applicable to the admission of hearsay statements for the truth of

their contents. Such evidence is admissible if it meets the criteria of necessity and threshold reliability. The necessity element is met because Ms. Asp refused to testify at Mr. Larue's trial. In this case, as in *Bradshaw*, the threshold reliability of the hearsay statements is the main issue.

[49] Threshold reliability is established when “the hearsay is sufficiently reliable to overcome the dangers arising from the difficulty of testing it” due to the absence of contemporaneous cross-examination of the hearsay declarant: *Bradshaw* at para. 26. The trial judge needs to identify the specific hearsay dangers that arise from the statement and determine if those dangers are addressed in the evidence:

[27] The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).

[50] Procedural reliability relates to “adequate substitutes” to replace the traditional methods of ascertaining the truth and accuracy of the statement – giving oral testimony in court, under oath, and subject to cross-examination. Adequate substitutes to address the procedural reliability of a hearsay statement include a video recording of the statement, the presence of an oath in the out-of-court statement, or a warning about the consequences of lying. Some form of cross-examination, either at a preliminary inquiry, or of a recanting witness at the trial proper, is usually required to provide a satisfactory basis for testing the evidence: *Bradshaw* at para. 28.

[51] The majority made clear that the inclusion of a *Vetrovec* warning to the jury regarding hearsay evidence was not an adequate substitute for traditional safeguards, at para. 29:

[29] However, jury warnings about the dangers of hearsay evidence or *Vetrovec* testimony do not provide adequate substitutes for traditional safeguards. Instructing a jury on *how* to evaluate a statement that it lacks the *means* to evaluate does not address the hearsay dangers that underlie the exclusionary rule. Furthermore, *Vetrovec* warnings are designed to address concerns about a witness who is inherently untrustworthy, despite the

opportunity to cross-examine in court. They are not tools for assessing the truth and accuracy of a hearsay statement in the absence of contemporaneous cross-examination.

[52] The second basis on which a hearsay statement may be admissible for the truth of its contents is if its *substantive* reliability – the inherent trustworthiness of the statement – is established. In order to assess the inherent trustworthiness of a hearsay statement, the trial judge can consider the circumstances in which it was made, and any evidence that corroborates or conflicts with the statement: *Bradshaw* at para. 30.

[53] The standard for substantive reliability is high, but it does not have to be established with “absolute certainty”. The standard has been expressed in different ways, including when “there is no real concern about whether the statement is true or not because of the circumstances in which it came about”: *R. v. Khelawon*, 2006 SCC 57 at para. 62; or, when the only likely explanation is that the statement is true: *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 at para. 40; *Bradshaw* at para. 31.

[54] Finally, the *Bradshaw* majority held, at para. 32, that the two bases of procedural and substantive reliability can work together to establish the threshold reliability of a hearsay statement, but that the circumstances in which both are present and establish threshold reliability would seldom occur:

[32] These two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (*Khelawon*, at para. 65) and “factors relevant to one can complement the other” (*Couture*, at para. 80). That said, the threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents (*Khelawon*, at para. 49). For example, in *U. (F.J.)*, where the Court drew on elements of substantive and procedural reliability to justify the admission of a hearsay statement, both cross-examination of the recanting witness and corroborative evidence were required to meet threshold reliability, though neither on its own would have sufficed (see also *Blackman*, at paras. 37-52). I know of no other example from this Court’s jurisprudence of substantive and procedural reliability complementing each other to justify the admission of a hearsay statement. Great care must be taken to ensure that this combined approach does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers.

[55] The main issue in *Bradshaw*, as in this case, was “when and how can a trial judge rely on corroborative evidence to conclude that substantive reliability is established?”

[56] Justice Karakatsanis explains the difference between the trial judge assessing “threshold reliability” and the trier of fact assessing “ultimate reliability”. They are approached differently. In assessing ultimate reliability, once the evidence is admitted, the trier of fact considers whether and to what extent the statement should be believed. That assessment involves a consideration of all of the evidence, “including evidence that corroborates the accused’s guilt or the declarant’s overall credibility”: *Bradshaw* at para. 39.

[57] On the other hand, the consideration at the threshold reliability stage is “whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process”: *Bradshaw* at para. 40. A trial judge may only consider corroborative evidence that actually goes to the “truthfulness or accuracy of material aspects of the statement”: *Bradshaw*, paras. 44-46. Additionally, corroborative evidence must “work in conjunction with the circumstances to overcome the *specific hearsay dangers* raised by the tendered statement”. The majority held, at para. 47:

[47] ... When assessing the admissibility of hearsay evidence, “the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility” (*Khelawon*, at para. 4). Thus, to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination (*Khelawon*, at para. 107; *Smith*, at p. 937). Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the *only likely explanation* for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement (see *U. (F.J.)*, at para. 40). Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist.

[48] In assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement (*Smith*, at pp. 936-37). Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it “eliminate[s] the hypotheses that cause suspicion” (S. Akhtar,

“Hearsay: The Denial of Confirmation” (2005), 26 C.R. (6th) 46, at p. 56 (emphasis deleted)). In contrast, corroborative evidence that is “equally consistent” with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance (*R. v. R. (D.)*, [1996] 2 S.C.R. 291, at paras. 34-35). Adding evidence that is supportive of the truth of the statement, but that is also consistent with alternative explanations, does not add to the statement’s inherent trustworthiness.

[49] While the declarant’s truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led on *voir dire*, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.

[50] To be relied on for the purpose of rejecting alternative hypotheses for the statement, corroborative evidence must itself be trustworthy. Untrustworthy corroborative evidence is therefore not relevant to the substantive reliability inquiry (see *Khelawon*, at para. 108). Trustworthiness concerns are particularly acute when the corroborative evidence is a statement, rather than physical evidence (see *Lacelle*, at p. 390).

[58] These passages identify significant matters for the assessment of threshold reliability. First, the trial judge must be able to rule out any “plausible alternative explanations on a balance of probabilities”. These alternative explanations may be speculative. Corroborative evidence that is equally consistent with the truthfulness or accuracy of the hearsay statement as well as another hypothesis is of no assistance.

[59] In addition, the corroborative evidence itself must be trustworthy. Justice Karakatsanis summarized the approach at para. 57:

[57] In sum, to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should

1. identify the material aspects of the hearsay statement that are tendered for their truth;
2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement.

[60] As the circumstances in *Bradshaw* bear some common features with this case, it is worth exploring the factual matrix in the *Bradshaw* decision. Two people were killed on different days. The police ran a “Mr. Big” operation to obtain admissions from Mr. Thielen. During the course of the operation, Mr. Thielen admitted killing the two victims. Two months later he said he had killed one victim, but “Paulie” (Mr. Bradshaw) had killed the other one. Mr. Thielen met with Mr. Bradshaw, and in a recorded, but only partially audible recording, Mr. Bradshaw admitted participating in the two murders. A recorded conversation occurred two days later where Mr. Bradshaw admitted an unsuccessful attempt to kill one of the victims.

[61] When Mr. Thielen was arrested and confronted with the Mr. Big admissions, he made statements to the police, including a six-hour re-enactment of the crime implicating Mr. Bradshaw. The two were jointly charged, however, Mr. Thielen pleaded guilty to second degree murder before the trial. He was called as a witness at Mr. Bradshaw’s trial, but refused to testify and was found in contempt of court. The parallels with Ms. Asp are obvious.

[62] The Crown tendered the out-of-court re-enactment statement made by Mr. Thielen. The trial judge admitted the evidence, concluding that the statement was necessary and reliable. He found reliability on the basis that the statement was voluntary, incriminating, made after Mr. Thielen had received legal advice, was a detailed, free-flowing narrative, and was corroborated by extrinsic evidence. The trial judge relied significantly on the existence of corroborative evidence to find that the re-enactment statement was admissible. In particular, he relied on:

- forensic evidence that corroborated Thielen’s detailed description of the murders;
- Thielen’s accurate description of the weather on the nights of the murders;
- evidence of a conversation between Bontkes and Motola on the night Bontkes died (Motola was a third accomplice in Bontkes’s death and pled guilty to manslaughter in separate proceedings.);

- evidence that Bradshaw may have been present when Motola and Thielen discussed their plan to kill Bontkes;
- call records between one of the murder victims and Bradshaw on the night of one of the murders, and between Thielen and Bradshaw on the night of the other murder; and
- Bradshaw's admissions at the Best Western and Bothwell Park.

[63] The majority concluded that none of the external evidence noted above was of assistance in the threshold reliability analysis.

[64] The majority pointed out that Mr. Thielen's evidence was suspect for a number of reasons, including the fact he was a *Vetrovec* witness, which made the hearsay dangers of his evidence "particularly severe": *Bradshaw* at para. 68.

[65] At para. 71, the majority clearly stated that, "corroborative evidence or circumstances showing that the statement is inherently trustworthy are required to rebut the presumption of inadmissibility". The majority also concluded that the taped statements of Mr. Bradshaw himself could not corroborate the statement of Mr. Thielen because Mr. Bradshaw's statements were not trustworthy, primarily because they were the result of a "Mr. Big" operation. While admissible against Mr. Bradshaw at trial, they were not helpful in assessing whether Mr. Thielen was telling the truth.

[66] I turn then to the approach taken by the trial judge in this case. First, he relied on the trial judgment in *Bradshaw*, which in my view, led him into error. In my opinion, the trial judge made the mistake of assessing ultimate reliability, rather than threshold reliability. He did not ask and answer the question of "whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process": *Bradshaw* at para. 40; *Khelawon* at para. 49. As a result, it is necessary to carefully examine the evidence and ascertain its threshold reliability and, therefore, its admissibility.

[67] The first step is to identify the material aspects of the hearsay statement that are tendered for their truth. The material aspect of Ms. Asp's hearsay statements are her discussions of Mr. Larue's participation in Mr. Seybold's murder.

[68] The next step is to identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case. As in *Bradshaw*, a number of common hearsay dangers are not present here, because the statements were recorded. The main hearsay danger in this case is the risk that Ms. Asp lied to the police about Mr. Larue's participation in the killing. Because the statements were elicited as part of a Mr. Big operation, from a *Vetrovec* witness, there are overlapping reasons to be concerned about the truthfulness of Ms. Asp's statements. While there is no "blanket prohibition" from admitting a hearsay statement from a *Vetrovec* witness, as noted above, establishing the trustworthiness of such a witness will be "extremely challenging" because the hallmark of a *Vetrovec* witness is that they "cannot be trusted to tell the truth, even under oath": *Bradshaw* at para. 69.

[69] The third step is to search for plausible alternative explanations to the truthfulness of Ms. Asp's statement that Mr. Larue participated in Mr. Seybold's murder. She admitted to undercover officers that she hit Mr. Seybold three times with a baseball bat, and heard his skull crack. She could have been implicating Mr. Larue to attempt to cover or mitigate her own conduct. In addition, the defence theory was that it was Ms. Asp's mother, Jessie Asp, who was the person who inflicted the blows. According to Ms. Asp's and Mr. Larue's Mr. Big statements, she was the person with the motive to kill Mr. Seybold.

[70] The fourth step is to consider whether there is corroborative evidence that rules out "these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about or accuracy of the material aspects of the statement": *Bradshaw* at para. 57.

[71] The evidence the trial judge relied on as corroborative is set out above. In my view, in light of *Bradshaw*, most of that evidence does not corroborate the

truthfulness of the material aspects for which the Crown sought to adduce Ms. Asp's hearsay statement – the question of whether Mr. Larue was involved in the murder.

[72] The evidence that the police impressed upon Ms. Asp the importance of “honesty, loyalty, truth” and so on as part of the Mr. Big operation does not assist in showing that Ms. Asp's statements that Mr. Larue committed the murders meets the standard of threshold reliability to be put to the jury. The trial judge found that Ms. Asp had no motive to lie about the statements – she did, however, have a motive to lie. The statement was made to undercover officers in a Mr. Big operation, where a grave concern regarding the admission of such evidence is the creation by the police of a motive for the target to lie. The trial judge did not fully consider, no doubt because *Hart* had not yet been decided, the implication of Ms. Asp's statements being derived from a Mr. Big operation.

[73] The judge concluded that Ms. Asp's admission of hitting Mr. Seybold with the bat supported the threshold reliability of her statement that Mr. Larue participated in the killing. This evidence does not assist in ascertaining threshold reliability of the statement that Mr. Larue participated in the killings. As discussed above, if anything, this admission speaks to a very compelling “plausible alternative explanation” – that Ms. Asp sought to implicate Mr. Larue in an attempt to lessen her own culpability.

[74] The evidence of the flashlight with Mr. Seybold's DNA on it and Mr. Seybold's DNA in the car does not assist in determining whether Mr. Larue participated in the killings. The fact that Ms. Asp's statements corroborated the existence of alarm sensors on the property adds nothing to the assessment of the material aspect of Ms. Asp's hearsay statement – whether Mr. Larue participated in the killing. Similarly, in *Bradshaw*, the majority noted that Mr. Thielen's corroboration of a similarly benign factor – the weather on the nights of the murders – “does not mitigate the danger that he lied about Bradshaw's participation”: at para. 72.

[75] In my view, none of the evidence relied on by the trial judge was properly corroborative of the material aspect of Ms. Asp's evidence in terms of whether she was truthful regarding Mr. Larue's participation in the killings. All could support

plausible alternative explanations that Ms. Asp, or her mother Jessie Asp, or both, were involved.

[76] There are two pieces of evidence that were not relied on by the trial judge to which the Crown on the appeal refers. First is the aluminum bat that was found with Mr. Seybold's and Mr. Larue's DNA on it. However, there could well have been cross-contamination as the police officer handled several exhibits with the same gloves. This evidence therefore is not sufficiently trustworthy in and of itself to be relied on to support the admission of Ms. Asp's hearsay statements. Finally, there are admissions made in the context of the Mr. Big operation by Mr. Larue himself. While this evidence was admissible against Mr. Larue (and its admission is not challenged on appeal), it has the same concerns over trustworthiness as was in the evidence of Mr. Thielen in *Bradshaw*. Indeed, the concerns are even more acute in this case. Mr. Bradshaw was not dealing directly with the Mr. Big operators, he was speaking only with Mr. Thielen, or so he thought. Here, Mr. Larue's statements were given to undercover officers in the Mr. Big operation, and thus carry the usual concerns over trustworthiness and cannot be relied on to corroborate the threshold reliability of Ms. Asp's hearsay statements. The fact that Mr. Larue gave inconsistent statements to the Mr. Big operators exemplifies the problems with relying on those statements to corroborate the out-of-court statements by Ms. Asp.

[77] In my view, there is an insufficient basis to conclude that Ms. Asp's statements to the Mr. Big operators meet the test of threshold reliability to be admitted under the principled approach to hearsay as articulated in *Bradshaw*.

[78] In my view, the trial judge erred in permitting these statements to go before the jury.

[79] As a result of this conclusion, I would order a new trial. Thus, I will not address the remaining grounds of appeal, except the issue of a directed verdict on first degree murder. Mr. Larue said there should have been a directed verdict on the charge of first degree murder. There was clearly evidence from the Asp statements and Mr. Larue's statements to support the charge of first degree murder going

before the jury. The question is if Ms. Asp's statements are removed, is there sufficient evidence to order a new trial on first degree murder. In my view there is – in Mr. Larue's Mr. Big statement, he says he knew he was probably going to kill Mr. Seybold before he and Ms. Asp arrived at his property and had a plan. While perhaps not overwhelming evidence, it cannot be said that there is no evidence to support a charge of first degree murder.

**Conclusion**

[80] Therefore, I would allow the appeal on the basis that Ms. Asp's hearsay statements should not have been admitted at the trial. I would set aside Mr. Larue's conviction and order a new trial on a charge of first degree murder.

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The Honourable Madam Justice Bennett

**Reasons for Judgment of the Honourable Madam Justice Dickson:****Introduction**

[81] I have had the privilege of reading the draft reasons for judgment of my colleague, Justice Bennett. With respect, I have come to a different conclusion. In my view, the trial judge did not err in holding Ms. Asp's statements met the requirements of threshold reliability under the principled approach to hearsay evidence developed in *R. v. Khelawon*, 2006 SCC 57. In the unusual circumstances of the case and despite the limited use for corroborative evidence established in *Bradshaw*, as I see it, the record amply supports his ruling. Given all of the procedural and substantive reliability factors the judge considered, Ms. Asp's hearsay statements were sufficiently reliable to overcome the dangers arising from the lack of opportunity for contemporaneous cross-examination.

[82] My colleague has set out much of the relevant evidence, the applicable law and the impugned hearsay ruling. I would only highlight or supplement the following points to assist in explaining why I disagree.

**Evidence**

[83] On March 26, 2008, police found Mr. Seybold's remains in the charred shell of his log cabin and a baseball bat and two broken rifles from his residence in a dumpster at a nearby rest area. As my colleague notes, forensic analysis linked bloodstains on the bat and rifles to Mr. Seybold. The officer who seized the bat and rifles acknowledged she did not wear separate gloves when she seized them and that doing so would have been preferable as it would have prevented the possibility of cross-contamination from bat to rifle or rifle to rifle (although the bat and rifles were already touching one another prior to the seizure). Importantly, in addition to linking the bat and rifles to Mr. Seybold, forensic analysis also linked biological material recovered from the handle of the bat to Mr. Larue.

[84] Ms. Asp made two statements to undercover operators that the Crown sought to admit at Mr. Larue's trial for the truth of their contents. The first, made on

February 28, 2009, was video-recorded; the second, made on March 3, 2009, was audio-recorded. On the *voir dire*, the judge watched and listened to the recordings before ruling that the statements were admissible. Both statements were rich in detail, before, during and after the event in which Ms. Asp claimed that, acting together, she and Mr. Larue killed Mr. Seybold.

[85] In her February 28 statement, Ms. Asp told the undercover operator that Mr. Seybold had disrespected Jessie Asp, her mother, which was why she and Mr. Larue went to his cabin. She described travelling to the cabin with Mr. Larue in her mother's truck, watching Mr. Larue fight fiercely with Mr. Seybold, and, at one point, intervening in the fight and hitting Mr. Seybold on the head with a baseball bat "about three times". She also stated that, after doing so, she gave the bat to Mr. Larue, who "started swinging" and "did him pretty much in". Then, she said, he set the cabin on fire. At one point, she mentioned that Mr. Larue brought an airgun along with him.

[86] Ms. Asp also gave a detailed description of events she said followed the fatal beating. For example, she said that, as they left the cabin, Mr. Larue backed up and hit a tree, which damaged her mother's truck, and that he later backed into a pole in an attempt to obscure the damage. The pole, she said, was outside an arena where a hockey game was taking place. She went on to say they burned their clothes after the killing, left town together and went to Alberta to see Mr. Larue's sister, whom Mr. Larue told about the murder. When she made her February 28 statement, Mr. Larue was in prison in Edmonton.

[87] In her March 3 re-enactment statement, Ms. Asp repeated many of the same details and added others. For example, she mentioned again driving to the cabin with Mr. Larue in her mother's truck, Mr. Larue fighting with Mr. Seybold, and hitting Mr. Seybold on the head herself with the bat about three times. She also mentioned returning the bat to Mr. Larue and watching him go "to town" with it, adding that Mr. Larue tied up Mr. Seybold after the beating. When Ms. Asp took the undercover operators to the rest area where the bat and broken rifles were located, she said

Mr. Larue smashed the rifles and they concealed them in the garbage container. When she made her March 3 statement, Mr. Larue was still in prison.

[88] On July 29, 2009, Mr. Larue was released from prison and Ms. Asp and an undercover operator visited him at his halfway house in Calgary. Two days later, he made the first of his admissible Mr. Big statements. He made another the following day. Like Ms. Asp's Mr. Big statements, Mr. Larue's were rich in detail regarding the Seybold murder. For example, he explained that he and Ms. Asp went to Mr. Seybold's cabin because Mr. Seybold had disrespected Jessie Asp and said that, in the course of a fierce fight, he beat Mr. Seybold with a baseball bat. He also said that Ms. Asp hit Mr. Seybold on the head with the bat "a few times" and he (Mr. Larue) set the cabin on fire, adding that, after hitting him with the bat, he slit Mr. Seybold's throat. Further, he mentioned bringing a starter pistol to the Seybold cabin and stated that after the killing they got rid of the bat and the guns taken from the cabin at a rest stop. Like Ms. Asp, he described hitting a tree as they left the Seybold property, and said they subsequently backed the truck into a pole outside of an arena where there was a hockey game. He went on to say they later burned their clothes and that he told his sister about killing Mr. Seybold.

[89] Between July 29 and August 4, 2009, police intercepted several telephone calls between Ms. Asp and Mr. Larue. As my colleague notes, when discussing the criminal organization they thought they were dealing with, Mr. Larue told Ms. Asp he was anxious to get to work and that she "did good". At one point, he mentioned that he had taken apart the starter pistol he brought to the Seybold cabin and disposed of it. He did not express any concern about the criminal organization or Ms. Asp's actions in introducing him to them. Quite the contrary, he made it clear that he was pleased.

[90] At his trial (though not on the *voir dire*), Mr. Larue testified that, when Ms. Asp visited him on prison on May 8, 2009, she told him she worked for a criminal organization and had implicated him in Mr. Seybold's murder. He also claimed she smuggled him a one-page letter outlining the circumstances of Mr. Seybold's death

and asked him to memorize those details, which he did and then later destroyed the letter. At her trial, Ms. Asp did not testify that she did this.

[91] The judge at Ms. Asp's trial admitted her February 28 and March 3 statements to the undercover operators and Crown counsel cross-examined her on them. At Mr. Larue's trial, his counsel submitted that, if the statements were ruled admissible, all of Ms. Asp's statements and trial evidence should be placed before the jury. Crown counsel agreed, as did the judge.

**R. v. Bradshaw, 2017 SCC 35**

[92] *Bradshaw* represents an important development in the law on the admissibility of hearsay evidence and, in particular, the limited use of corroborative evidence for determining a hearsay statement's threshold reliability. In *Bradshaw*, the Court affirmed that not all extrinsic evidence which corroborates the credibility of a declarant, the guilt of an accused or a party's theory of the case is of assistance in assessing the threshold reliability of hearsay. Rather, to be of assistance on a substantive reliability inquiry corroborative evidence must relate to the trustworthiness of the disputed out-of-court assertion. This is because threshold reliability is only established when a hearsay statement is reliable enough to overcome the dangers arising from the inability to test it through contemporaneous cross-examination. Those dangers can be overcome by showing adequate substitutes for testing the statement's truth and accuracy (procedural reliability) or sufficient circumstantial or evidentiary guarantees of the statement's inherent trustworthiness (substantive reliability). Procedural and substantive reliability are not mutually exclusive and, operating in tandem, they can complement one another: *Bradshaw* at paras. 27-32.

[93] As the Court explained in *Bradshaw*, substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to reject plausible alternative explanations for a hearsay statement other than the declarant's truthfulness or accuracy. To assist in a threshold reliability determination, when considered as a whole and in the circumstances, corroborative evidence must

show that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, its material aspects: *Bradshaw* at paras. 31, 40, 44 and 47. There are strong policy reasons for limiting the use of corroborative evidence in this manner. For example, as the Court emphasized in *R. v. Blackman*, 2008 SCC 37, if a trial judge is entitled to consider any extrinsic evidence that corroborates any part of a hearsay statement when assessing its threshold reliability, the *voir dire* could become an unwieldy trial within a trial. There is also a risk that flawed inculpatory hearsay could be admitted simply because there is strong evidence of the guilt of the accused.

[94] While the standard for substantive reliability is high, it is not necessary to establish the trustworthiness of a hearsay statement with absolute certainty to render it admissible. Threshold reliability may be established on a balance of probabilities. Accordingly, on a substantive reliability inquiry, based on the circumstances and any corroborative evidence, the judge must be able to rule out any plausible alternative explanations for a hearsay statement on a balance of probabilities: *Bradshaw* at para. 49.

[95] Extrinsic evidence that supports the truth of a hearsay statement is corroborative: *R. v. Couture*, 2007 SCC 28 at paras. 83-84. In *Couture*, the trial judge found the testimony of three witnesses to whom the declarant repeated aspects of the accused's alleged disclosures amounted to corroboration for purposes of threshold reliability. However, the Supreme Court of Canada overturned this finding and discussed the sort of evidence that could qualify, as well as its potential significance:

[84] ... corroboration can be powerful to substantiate the trustworthiness of a statement. Recall the semen stain in *R. v. Khan*, [1990] 2 S.C.R. 531. For example here, Darlene told the police that Mr. Couture had admitted to sexually assaulting both victims after their death. There was no forensic evidence of this nature on the *voir dire* or at trial. However, assuming that there had been evidence that the victims had indeed been sexually assaulted, and that this evidence was not likely to have been known by anyone other than the investigators and the perpetrator at the time of the statement, this corroborative evidence would lend much cogency to the statement. ...

[96] *Couture* is one of a handful of authorities the Court referred to repeatedly in *Bradshaw. R. v. U.(F.J.)*, [1995] 3 S.C.R. 764 is another. In *U.(F.J.)*, the hearsay statement of a recanting sexual assault complainant was found admissible in part because it was corroborated by a strikingly similar statement made by the accused, her father, close in time to the initial complaint. Chief Justice Lamer concluded the only likely explanation for the striking similarity between the two statements was the truthfulness of the hearsay declarant because, in the circumstances, there was no other likely alternative explanation for the striking similarities:

[40] ... When two statements contain similar assertions of fact, one of the following must be true:

1. The similarity is purely coincidental.
2. The similarity is the result of collusion between the two declarants, before one or both of their statements were made.
3. The second declarant knew of the contents of the first statement, and based his or her statement in whole or in part on this knowledge.
4. The similarity is due to the influence of third parties, such as an interrogator, who affected the contents of one or both of the statements.
5. The similarity occurred because the two declarants were both referring to an actual event -- that is, they were both telling the truth.

The first four explanations are, of course, equally consistent with the similar portions of the statement being true or false. It becomes possible to conclude that the similar portions of the statements are true only when it can be established that none of the first four alternatives are likely, and that the fifth option is thus the only likely explanation. Consequently, striking similarities between two statements will only enhance the likelihood that either of the statements is reliable when there is a basis for rejecting as unlikely all the alternative explanations.

...

[42] In general, it will only be possible to reject the possibility that the second statement was tainted by outside influence or collusion if the statements were made in circumstances providing sufficient guarantees against the possibility of collusion by the declarants, prior knowledge of the first statement by the second declarant, or influence by the interrogator or some other third party. In cases involving an accused's purely incriminatory statement, the prospect of there having been collusion between the accused and the other declarant will tend to be remote, unless there is evidence indicating that the accused had a reason to conspire with a witness to falsely incriminate himself or herself. ...

[97] The material aspects of a hearsay statement are those relied upon by the moving party for the truth of their contents. In other words, the materials aspects of

an out-of-court assertion are those aspects of its content that are *relevant, disputed and tendered to prove their truth*. As noted, if evidence of a disputed hearsay assertion is equally consistent with another plausible hypothesis, even if speculative, the evidence does not add to the statement's inherent trustworthiness. For this reason, although such evidence may be probative of the guilt of an accused, it does not assist in an inquiry into the substantive reliability of the hearsay.

[98] In my view, while *Bradshaw* developed the law on the limited use for corroborative evidence in establishing threshold reliability, it is important to remember the principled approach to hearsay articulated in *Khelawon* continues to govern. It is also important to place the high bar for the use of corroborative evidence set in *Bradshaw* within its proper context. In *Bradshaw*, the hearsay at issue was Roy Thielen's re-enactment statement to police identifying Robert Bradshaw as an accomplice in two murders. The Crown tendered the statement for the truth of his claim that Mr. Bradshaw participated in the murders, which was its material aspect. The specific danger raised by the disputed hearsay was the inability of a trier of fact to assess whether Mr. Thielen lied to police about Mr. Bradshaw's participation. His own role in the crimes was apparently not a matter of dispute.

[99] The circumstances in which Mr. Thielen made his statement were highly significant with respect to its substantive reliability. In particular, he made the statement to police after he was arrested, having previously been the target of a Mr. Big operation. He also initially denied his own involvement in the murders and implicated Mr. Bradshaw only after learning that he had been targeted. In other words, when Mr. Thielen made the disputed hearsay statement he had a clear motive to lie, minimize his role in the murders and attempt to shift blame to Mr. Bradshaw.

[100] There were also other reasons to be concerned that Mr. Thielen, an unsavoury *Vetrovec* witness, lied to police about Mr. Bradshaw's participation in the murders. For example, the hearsay statement was inconsistent with a prior statement he made to an undercover officer in which Mr. Thielen claimed that he

committed the murders but did not implicate Mr. Bradshaw. In addition, the majority of the Court held there was no trustworthy corroborative evidence that substantially negated the possibility Mr. Thielen lied when he told police that Mr. Bradshaw participated in the murders.

[101] The majority of the Court concluded there was no trustworthy corroborative evidence in *Bradshaw* in part because some of the extrinsic evidence the trial judge relied upon corroborated only his description of how the murders unfolded. However, as Justice Karakatsanis noted, the Crown did not tender the hearsay to prove how the murders unfolded and the evidence in question did not implicate Mr. Bradshaw. Although there was other extrinsic evidence that did implicate Mr. Bradshaw, while probative of his guilt, it did not assist in effectively ruling out the alternative plausible explanation for the disputed hearsay, namely, that Mr. Thielen lied to police about Mr. Bradshaw's participation. Further, because he pleaded guilty to second-degree murder, Mr. Thielen was never cross-examined on his statement implicating Mr. Bradshaw in the crimes.

### **Hearsay Ruling**

[102] The judge began his hearsay ruling by describing Ms. Asp's February 28 and March 3, 2009 statements and her refusal to testify. Next, he summarized the parties' positions on the admissibility of her statements under the principled exception to the hearsay rule. In doing so, he noted the Crown position that the statements "should be admitted for the truth of their contents". He also noted the defence position that they did not meet the test for threshold reliability because Ms. Asp manipulated the undercover operators for money, the judge could "have no confidence that she is ever telling the truth" and the judge "simply cannot believe anything that Ms. Asp says".

[103] The judge referred to the trial level decision in *Bradshaw* early in his ruling. However, unlike my colleague, I would not describe that decision as having guided his threshold reliability analysis. After noting several cases cited by the parties, the judge identified the guiding decisions as *Khelawon* and *R. v. Post*, 2007 BCCA 123.

As I read his ruling, he relied on the general principles summarized in the trial decision in *Bradshaw*, which, in turn, reproduced the principles established in *Khelawon* and summarized in *Post*. He went on to guide his analysis by the *Post* 12-point summary of principles, which he applied on a point-by-point basis. I see no error in this manner of proceeding.

[104] The judge recognized, accurately, that, while similar in some respects, the facts in *Bradshaw* differed from those in this case. As noted, in *Bradshaw* Mr. Thielen implicated Mr. Bradshaw only after police arrested him. In contrast, in this case, Ms. Asp implicated Mr. Larue in Mr. Seybold's murder when she was speaking with undercover operators she thought were members of a criminal organization and her new friends. As discussed below, any conceivable motive Ms. Asp could have had to implicate Mr. Larue falsely to the undercover operators bore no resemblance to Mr. Thielen's obvious possible motive for implicating Mr. Bradshaw falsely after he was arrested. In my view, the judge rightly did not treat the surrounding circumstances of Ms. Asp's statements, on the one hand, and Mr. Thielen's statements, on the other, as analogous.

[105] Nor would I say the judge made the mistake of assessing ultimate reliability, rather than threshold reliability. He was alive to the distinction, which he discussed when he dealt with point 12 of the *Post* summary. Further, although he did not specifically ask and answer in so many words the question of "whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process", he dealt at length with whether the truth and accuracy of Ms. Asp's statements could be sufficiently tested. For example, he noted that there were "a number of, albeit, substitutes, which go a considerable way to test for the accuracy or reliability of the truth of these statements" and listed several procedural and substantive reliability factors, including the recordings, the circumstances and the evidence he considered corroborative of the truth of her assertions regarding the murder.

[106] My colleague has reproduced paragraphs 23-24 of the judge's hearsay ruling. In those paragraphs, he provided a non-exhaustive list of extrinsic evidence he saw as corroborative of "much of what Ms. Asp has said in her statements". Given the stated purpose for which the Crown tendered the statements (the truth of their contents), the defence position on threshold reliability (nothing Ms. Asp said to the undercover operators, whom she manipulated, could be believed) and the claimed joint nature of the murder, in my view, this approach was, while arguably overbroad, understandable. Further, while I accept that some of the evidence the judge mentioned does not corroborate material aspects of Ms. Asp's statements, for the reasons explained below, considered as a whole and in the circumstances, some of it does.

[107] The judge also considered whether Ms. Asp's statements were the product of manipulation and coercion by the undercover operators. After reviewing the circumstances in which she made the statements, and watching and listening to the recordings, he concluded, unequivocally, that Ms. Asp's February 28 and March 3 statements were not the result of police manipulation or coercion.

[108] Finally, the judge considered the fact that all of Ms. Asp's statements and trial evidence would be placed before the jury, which, he said "will go some distance to ameliorate the loss of the opportunity to cross-examine Ms. Asp and confront her with any inconsistencies". As noted, counsel for the Crown cross-examined Ms. Asp at her trial on the statements she made to the undercover officers. In other words, the judge considered both procedural reliability and substantive reliability factors in his threshold reliability ruling. He also weighed the prejudicial effect of the evidence with its probative value, concluding the latter outweighed the former because "to keep these statements from the jury would be to deny the jury critical evidence about the killing from the only eyewitness to it".

### **Discussion**

[109] As Justice Bennett states, the Supreme Court of Canada released *Bradshaw* after the judge made the hearsay ruling. It is, therefore, unsurprising that he did not

structure his analysis of corroborative evidence in the four steps outlined in *Bradshaw*. Nevertheless, read as a whole, I consider his ruling grappled adequately with the substance of those steps in the context of the factual matrix and live issues in the case for purposes of determining whether Ms. Asp's statements met the threshold reliability test. In reaching this conclusion, I bear in mind Justice Karakatsanis' statement in *R. v. Youvarajah*, 2013 SCC 41, on the limits of appellate review:

[31] The admissibility of hearsay evidence, such as the prior inconsistent statement in this case, is a question of law. Of course, the factual findings that go into that determination are entitled to deference and are not challenged in this case. As well, a trial judge is well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517 (S.C.C.), at para. 81.

[110] To repeat, the Court held in *Bradshaw* that, in determining whether corroborative evidence assists in a substantive reliability inquiry, a trial judge should:

- identify the material aspects of the hearsay statement tendered for their truth;
- identify the specific hearsay dangers they raise in the circumstances of the case;
- based on the circumstances and those dangers, consider alternative, even speculative, explanations for the statement; and
- determine whether the corroborative evidence rules out the alternative explanations such that the only remaining likely explanation is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[111] I agree with my colleague that the material aspects of Ms. Asp's hearsay statements are her assertions regarding Mr. Larue's participation in Mr. Seybold's murder. However, given the extent to which the defence disputed their truth, the

Crown's stated purpose in tendering them, and the inextricable linkage between Ms. Asp's asserted participation in the killing and that of Mr. Larue, their material aspects arguably also include her claims that, acting in concert, she and Mr. Larue killed Mr. Seybold. On this view, the hearsay dangers are that Ms. Asp lied to the undercover operators when she told them that she and Mr. Larue murdered Mr. Seybold together. Framed more narrowly, the dangers are that she lied about Mr. Larue's participation in the Seybold murder.

[112] As my colleague states, the plausible alternative explanations for Ms. Asp's statements for consideration on a substantive reliability inquiry are that she alone, or her mother, or both, murdered Mr. Seybold. To be of assistance, extrinsic evidence, when considered as a whole and in the circumstances, must show that the only likely explanation for her statements is that she was truthful about murdering Mr. Seybold together with Mr. Larue or about Mr. Larue's participation in the murder.

[113] Unsurprisingly, given the parties' positions on the purpose and disputed content of Ms. Asp's hearsay statements, the judge approached their material aspects from the broader perspective. In my view, this explains why, in conducting his substantive reliability inquiry, he took into account evidence such as the flashlight, the paint chips, and the Seybold DNA on the floor mat. Much of the evidence he noted supported particulars of Ms. Asp's account of her own participation in the crime, which the defence may be taken to have disputed. It also explains why he carefully considered whether her statements were the product of police manipulation. Further, and in any event, the judge specifically considered whether Ms. Asp might have lied about Mr. Larue's participation in the Seybold murder. On either view of their material aspects, I am not persuaded he erred in ruling that the threshold reliability of her statements was established.

[114] Although he did not express it in precisely these terms, the judge recognized the possibility that Ms. Asp lied about Mr. Larue's participation in the murder as a specific hearsay danger. He was concerned with whether there were any plausible alternative explanations for her statements implicating herself and Mr. Larue other

than their truth, considering the circumstances in which the statements were made. That is why the judge focused on whether, realistically, Ms. Asp had any motive to implicate either herself or Mr. Larue falsely when she spoke to the undercover operators and, in doing so, considered possible motives for doing so. However, noting that she had already acknowledged killing her ex-boyfriend, he found there was no benefit to her in bringing up any involvement in the Seybold murder. Nor, he found, was it plausible that she had a motive falsely to implicate Mr. Larue. As he put it, bearing in mind the nature and state of their relationship, “there was no motive for Ms. Asp to lie about Mr. Larue’s involvement in the murder” and “it defies common sense to think Ms. Asp would make up a story about Mr. Larue and her killing Mr. Seybold”.

[115] I cannot agree with my colleague that, contrary to the judge’s conclusion, Ms. Asp did have a possible motive to lie to the undercover operators by falsely implicating Mr. Larue in the Seybold murder. In the circumstances, it is simply not plausible to suggest “[s]he could have been implicating Mr. Larue to attempt to cover or mitigate her own conduct” or was doing so to “lessen her own culpability”.

[116] As the judge recognized, this was not a case like *Bradshaw*, in which the hearsay declarant could have benefited from minimizing his or her own role in a murder and casting blame on an accomplice. Unlike Mr. Thielen, Ms. Asp had no idea she was speaking to police when she described how she and Mr. Larue together killed Mr. Seybold. From her perspective, there was no need to cover anything up when discussing the matter. In addition, as the judge pointed out, Ms. Asp had already acknowledged having committed another killing when, of her own volition, she brought up the Seybold murder. This, too, showed there was no reason, however speculative, for her to attempt to mitigate her own conduct or lessen her own culpability. In my view, an alternative explanation for her statements to this effect is not plausible, much less very compelling.

[117] Nor can I agree that the judge failed fully to consider the implications of Ms. Asp’s statements being derived from a Mr. Big operation for purposes of his

substantive reliability analysis. He watched and listened to the recordings of the statements, carefully considered all of the surrounding circumstances and defence counsel's forceful submissions, then found as a fact that there was no hint of police misconduct and that the statements were not the result of police manipulation or coercion. While I agree the importance of "honesty, loyalty, truth" did not assist in showing Ms. Asp's statements regarding Mr. Larue's participation in the murder met the threshold reliability standard, I do not see *Hart* as adding a necessary, but missing, element to the judge's substantive reliability analysis. Rather, in my view, he fully considered the fact that Ms. Asp made her statements in the context of a Mr. Big scenario and, as stated in *Youvarajah*, his findings on the point are entitled to appellate deference.

[118] That said, I agree with my colleague that some of the evidence the judge mentioned at paras. 23-24 of his ruling does not assist in ruling out plausible alternative explanations other than the truthfulness of Ms. Asp's disputed hearsay statements, regardless of how broadly their material aspects are articulated. Such evidence was not helpful for determining threshold reliability. For example, Ms. Asp's statements that there were alarm sensors on Mr. Seybold's property did not mitigate the hearsay danger that she lied about Mr. Larue's participation in the Seybold murder (or her own) and thus did not contribute to their substantive reliability. Nevertheless, in my view, unlike *Bradshaw*, there was trustworthy extrinsic evidence that, considered as a whole and in the circumstances, amounted to powerful corroboration of material aspects of the disputed hearsay. In other words, there was corroborative evidence that showed the only likely explanation for Ms. Asp's statements regarding Mr. Larue's participation in the murder was her truthfulness because, on a balance of probabilities, it ruled out any other plausible alternative explanation for her statements.

[119] The first form of such evidence was the DNA match to Mr. Larue found on the bat at the rest stop, which item was also DNA matched to Mr. Seybold. I do not share my colleague's concern with the trustworthiness of this evidence, particularly given the location of Mr. Larue's DNA on the handle of the bat and the fact that the

only apparent risk of cross-contamination was from the rifles, which were also linked to Mr. Seybold. Absolute certainty is not necessary to establish substantive reliability. Nor is it necessary for a particular item of corroborative evidence to be considered in isolation. Like the theoretical corroborative evidence of sexual assault discussed in *Couture*, in my view Mr. Larue's DNA on the handle of the bat lent "much cogency" to Ms. Asp's claim that Mr. Larue participated in the Seybold murder.

[120] The second form of trustworthy corroborative evidence is Mr. Larue's statements to the undercover officer, the admissibility of which is unchallenged. Although I accept that, as my colleague points out, the usual Mr. Big concerns arise, they are mitigated in considerable measure by the tone and content of his intercepted conversations with Ms. Asp, which interceptions took place at roughly the time he made the statements in question. In my view, considered in the light of the interceptions, the usual Mr. Big concerns do not detract significantly from the trustworthiness of Mr. Larue's statements to the undercover operators and they are sufficiently trustworthy to assist in establishing the only likely explanation for Ms. Asp's statements is their truthfulness. This is particularly true in connection with Mr. Larue's statement regarding the disposal of the bat and guns at the rest stop, which admission is supported by the DNA evidence.

[121] The third form of trustworthy corroborative evidence is the similarity in detail between Ms. Asp's and Mr. Larue's statements to the undercover operators. While not identical in every respect, as outlined above, the many and diverse similarities are striking indeed. On a *U.(F.J.)* analysis, given the timing and circumstances of the two sets of statements and despite Mr. Larue's (patently incredible) attempt to explain his statements away, the only likely explanation for the similarities is the truthfulness of Ms. Asp's statements regarding Mr. Larue's participation in the murder. In the circumstances, none of the other four possible explanations identified in *U.(F.J.)* are likely. This is particularly true of some of the striking similarities in peripheral and seemingly extraneous details, such as the shared claim that, after the

murder, they disposed of the bat at a rest stop and Mr. Larue told his sister what had happened.

[122] When the circumstances of Ms. Asp's statements are considered together with the DNA evidence linking Mr. Larue to the bat handle, his admissions to the undercover operators and the striking similarities between Ms. Asp's and Mr. Larue's statements, the only likely explanation for Ms. Asp's hearsay statements regarding Mr. Larue's participation in the murder was her truthfulness. In other words, the circumstances and corroborative evidence provide a rational basis to rule out any plausible explanations for her statements other than her truthfulness, on a balance of probabilities, and thus establish their substantive reliability. In substance, that is what the judge held.

[123] Finally, it is important to recall that the judge based his ruling on both procedural and substantive reliability factors. In the light of all of these factors, I see no error in his conclusion that threshold reliability was established.

### **Other Grounds of Appeal**

[124] I am also not persuaded there is merit to the other grounds of appeal that Mr. Larue raises. Like my colleague, I see the judge's response to the directed verdict application as appropriate, given the content of the statements made by Ms. Asp and Mr. Larue. I also see the judge's approach to the mistrial application, the jury instructions and the oath-helping issue as adequate.

[125] When the mistake in the recording transcript placed before the jury was discovered, the judge dealt with the matter promptly and effectively. He gave the jury a midtrial instruction, had the offending material removed and, in his final charge, reminded the jury that the transcripts were not evidence. I see no error in this approach. In addition, his final charge, read as a whole, while not perfect, ensured that, from a functional perspective, the jury was properly equipped to deal with the *Vetrovec* and Mr. Big reliability concerns that arose on the evidence. I would not give effect to either ground of appeal.

[126] As to oath-helping, Mr. Larue's counsel challenged the integrity of the Mr. Big investigation in respect of the tactics the police employed with Ms. Asp and the impugned oath-helping evidence was led in response to that challenge, to answer the point taken. It was not, as in *R. v. Murphy*, 2014 YKCA 7, adduced solely to bolster Ms. Asp's credibility: at paras. 8-9. In addition, the jury was exposed to evidence indicating that Mr. Big confessions are not always truthful and reminded of that evidence in the final jury charge.

**Conclusion**

[127] For all of these reasons, I would dismiss the appeal.

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The Honourable Madam Justice Dickson

I AGREE:

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The Honourable Madam Justice Charbonneau